In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 76-3

KERRY M. GOUGH, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,

Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET AND DRAPERY CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Kerry M. Gough petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 17, 1976, petition for rehearing denied on June 4, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached hereto

as Appendix A. It will be referred to herein as *Gough II*. The first opinion of the court of appeals is reported at 487 F.2d 373 (1973). It is attached hereto as Appendix B. It will be referred to herein as *Gough I*. The opinion of the trial court which was reviewed in the second appeal is attached hereto as Appendix C.

JURISDICTION

The opinion of the court of appeals was entered on March 17, 1976 (Appendix A). A petition for rehearing was denied on June 4, 1976 (Appendix E). An order denying a motion to stay mandate was entered on June 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. (a) Does *Neely v. Martin K. Eby Construction Co.* and the purpose of Rule 50 to speed litigation and avoid unnecessary trials place the responsibility of deciding issues of law, especially the substantiality of the evidence to support a verdict, upon the appellate courts in Rule 50(d) proceedings?

(b) May a motion for judgment *n.o.v.* be raised for the first time in a petition for rehearing without a showing of compliance with Rule 50(b)?

2. Does a remand for further proceedings following a dispositive opinion of the appellate court, without direction to hold a hearing as to the merits of any motion,

grant the trial court complete discretion to enter a judgment without specifically ruling on all arguments which were addressed to the appellate court in a petition for rehearing?

3. (a) Must a party against whom a judgment has been entered, following a complete review of the trial record by a first appellate court, show a second appellate court that the trial court abused its discretion in determining from his knowledge of the record and the proceedings that the plaintiff, who had established all factual issues except as to jurisdiction in his court, had a right to judgment?

(b) Is this not especially so when the judgment loser on remand has filed motions for judgment *n.o.v.* and new trial which were denied?

4. Are not the following issues urged as allowing a judgment *n.o.v.* sham or frivolous?:

A. Horizontal agreements among competitors alone are actionable conspiracies under the antitrust laws.

B. A successful conspiracy to prevent a competitor to one of the conspirators from advertising in a newspaper is not *per se* illegal.

C. A relevant market must be defined in a §1 Sherman Act case.

D. A retailer who had made sales of $17,000 in 3 months of selling to a market from which he is subsequently excluded and whose profits on these sales were approximately $6,000 is not entitled to a verdict as to lost profits of $18,000 for an approximately 2½ year period.

E. Upon the findings that a conspiracy was a substantial factor in closing a furniture store, at a loss, a retailer is not entitled to a loss of good will award of $22,738 where his books and records showed a $20,000 net profit in the year the market was open and then closed and his average net worth was $38,387.

5. Does not the acceptance of the benefits of a policy in restraint of trade by a retailer with knowledge of the restraint establish as a matter of law an actionable combination in restraint of trade?

6. May a second appellate court remand with directions to hold arguments on the merits of matters advanced in a petition for rehearing following a prior appellate court's declination to require that very mandate?

STATUTES INVOLVED

The statutes involved are §§1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2; §4 of the Clayton Act, 15 U.S.C. §15. These are printed and attached hereto as Appendix D.

STATEMENT OF THE CASE

A. THE TRIAL

1. The Parties.

The action involves the effectuation of an agreement to eliminate competition in the sale of carpets and drapes at a retirement community located in Walnut Creek, California, financed by federal mortgage commitments pursuant to Sec. 312 of the National Housing Act. 12 U.S.C. Sec. 1715(e).

The builder of the retirement community is Rossmoor Corporation. It is owned by Mr. Ross Cortese and his daughter (Tr. 937, 221-223, 923-926). Mr. Cortese determined also to go into the business of selling carpets and drapes to purchasers of the apartment houses, called manors (Tr. 945-946). He organized a corporation, Crestmark Carpet and Drapery, to enter into that business at the Rossmoor Leisure World communities (Tr. 55-56, 945-973). Rossmoor Corporation did not sell the manors to the public (Tr. 44-45). This was done by a separate corporation, Leisure World Foundation (successor to National Golden Rain Foundation) (Tr. 473-492). It would organize Mutual Corporations in which the purchaser would buy stock (Tr. 367-368, 471-477). The stock allowed occupancy of a manor and use of the community grounds (Id.). Officers or employees of Leisure World Foundation were placed upon the Board of Directors of the Mutual Corporations. This resulted in employees of Leisure World Foundation entering into construction contracts with Rossmoor after 90% of the shares had been reissued (Tr. 48-50, 491-498; Pl. Exs. 11, 122, 183). Leisure World also became the agent of the Mutuals in administering and running the community (Pl. Exs. 29-33.2). The community facilities were held in trust by another corporation, Golden Rain Foundation of Walnut Creek who also entered into management agreements with Leisure World Foundation (Tr. 367-368, 471-477, Pl. Ex. 29). The Leisure World Foundation operates a newspaper, the Leisure World News (Pl. Ex. 124, Tr. 237-240).

Rossmoor Corporation leased to Leisure World Foundation the Administration Building at Walnut Creek (Pl.

Ex. 8-1, Tr. 228-231), then Leisure World subleased 6000 square feet to Rossmoor Furniture Company, who assigned the lease to Crestmark (Pl. Ex. 9, Tr. 231-232, Pl. Ex. 14, Tr. 97). Rossmoor Furniture Company was a wholly owned subsidiary of Rossmoor (Tr. 932-933) and the predecessor of Classic Interior Decorating Co. (Id.).

On January 1, 1965, Rossmoor Furniture Co. had entered into an agreement with Chandlers-Laguna Hills whereby the sale of carpets and draperies at Walnut Creek was separated from the sale of furniture; Chandlers not to engage in the sale of carpets and drapes at the Administration Building furniture store, that being reserved to Crestmark (Pl. Ex. 13, Tr. 71-79).

Plaintiff, at the trial, was Louis Rosen doing business as Walnut Creek Furniture. He was in competition with the Crestmark Carpet and Drapery concession at the Administration building of Rossmoor Leisure World, Walnut Creek (Tr. 586-587). Plaintiff's store was located in downtown Walnut Creek, one mile from the Rossmoor development (Tr. 587).

2. The Evidence of Agreement in Restraint of Trade.

The first moves of residents into the community occurred about October 30, 1964 (Tr. 458). Mr. Rosen was unsuccessful in his attempt to find a way to reach prospective customers for advertising his furniture store (Tr. 586-590).

Leisure World and Crestmark entered into an agreement under which the purchasers of the manors would be required to select colors for their manors from the Crestmark salesman who was appointed by Leisure World as

the color consultant (Tr. 880-881, Pl. Ex. 42, 126-129; Pl. Ex. 36, Tr. 63-64). At the time of the color selection, the purchaser of the manor is to be sold carpets and drapes by the salesman (Tr. 128-29, Tr. 877-884). In order to insure these referrals, spiff payments were made by Leisure World to Crestmark salesmen (Pl. Ex. 39-1, 39-2). Drawings were also to be held by Crestmark at the beginning of each month so that Leisure World personnel who were instrumental in making the carpet and drapery sales would receive a prize (Tr. 149-150, Id.). Another device used was that Crestmark salesman would inform the buyer that carpet installation would be allowed prior to move in only if the carpets were purchased from Crestmark (Tr. 153-158, 883-884). The Leisure World Foundation had listening devices in the sales personnel offices to monitor their conversations (Tr. 535-537).

The Leisure World News was first published April, 1965 (Tr. 238). Each Leisure World Community had a newspaper (Pl. Ex. 124, Tr. 237-240). Its Executive Editor was Vera Moorman (Tr. 240, 978-981). The President of Rossmoor Corporation and owner, Mr. Ross Cortese, testified at Tr. 978-979:

"Q. Do you know a Vera Moorman?
A. Yes.
Q. What is her position or capacity?
A. She worked for the Foundation as part of the newspaper.
Q. She was an executive editor, was she not?
A. I don't know what they called her.
Q. Well, haven't you had conversations from time to time with Miss Moorman concerning business affairs, Mr. Cortese?

A. Not the Leisure World, no.

Q. You have discussed business with Mrs. Moorman, have you not?

A. She is a private consultant for us on the outside for newspaper articles.

Q. She also draws a salary from Leisure World Foundation, is that right?

A. Yes.

Q. So she is a consultant for Rossmoor Corporation and she is also an employee of Leisure World Foundation, is that correct?

A. Was."

Mr. E.L. Olsen, Vice President of Leisure World, wrote to its President in March, 1965 outlining a meeting between Mrs. Vera Moorman, *supra,* concerning an announcement that Crestmark had been appointed as exclusive sales agent for all Leisure World communities (Pl. Ex. 37, Tr. 980). She explained that Mr. Cortese had introduced Mr. McMullen of Crestmark to her and suggested that she write an article concerning Crestmark. Mr. McMullen then gave her information for the article. The statement had caused problems in connection with potential buyers. (Id.).

Mr. Robert Moon was a sales executive for Leisure World Foundation (Tr. 383), and for Rossmoor (Tr. 961-962).

The editor of the Leisure World News, Walnut Creek, was Mr. John L. Ferris (Tr. 237). Its advertising director was Mr. Carl Cronin (Tr. 898).

Mr. Cronin had solicited Mr. Rosen for his advertising in the Leisure World News in May, 1965. Mr. Rosen

was enthusiastic and signed a 52 week contract for 26 advertisements (Pl. Ex. 62, Tr. 589-591). Mr. Rosen then talked to representatives of the Mohawk Carpet, a manfacturer, and suggested that they plan to have five or six different fabrics which would apply to the type of people that would be expected to buy manors (Tr. 591-593). Mohawk agreed to give Mr. Rosen roll prices on all carpets, that they would supply him with labels for the names that Mr. Rosen would pick that would be used for the type of floor plans used in the construction of the mutuals. Mr. Rosen then advertised in the newspaper (Pl. Ex. 65, 66, 67, 125, 126, 127, 128). The advertisements showed prices below the Crestmark prices (Tr. 638). Such prices were shown in the editions of June 17, 1965, June 24, 1965 and July 15, 1965 (Pl. Exs. 65, 66 and 67).

At this time the newspaper staff in Walnut Creek was instructed that the paper could not allow wall to wall carpet advertising "from outside sources" in the Leisure World. Mr. Cronin testified that he learned of the policy when Mr. Nelson, the administrator of the Leisure World community at Walnut Creek was walking with Mr. Ross Cortese after the July 15, 1965 advertisement (Tr. 900-901). It was a Saturday morning. The following occurred (Tr. 901-903):

"Q. What were the circumstances under which you first learned that the newspaper company could not continue to carry wall to wall carpet advertising?

A. Saturday morning, going to the sales office to pick up the mail, Mr. Nelson was walking down the other side of the mall and I was walking on this side and he came over, stopped me, and said, 'It has been

decided that there will be no more wall to wall carpet advertising run from outside sources.'

Q. Now did you see anyone with Mr. Nelson at the time of this conversation?

A. Mr. Cortese and someone else that I don't recall who it was at this time.

Q. Did you see Mr. Cortese walking with Mr. Nelson?

A. Yes.

Q. As I understand your testimony then Mr. Nelson left Mr. Cortese and talked to you

A. Yes.

Q. And you heretofore indicated what Mr. Nelson told you, is that correct?

A. Yes.

Q. Did you say anything at this time? Before I ask you that, how far would you estimate Mr. Cortese was away from you and Mr. Nelson?

A. From here to the wall and back there by the time we were talking.

• • • • •

Q. What would you approximate that to be?

A. Oh, 40, 50 feet.

The Court: Call it 50 feet.

Mr. Keith: Q. Now could you tell us what was said and done then in this conversation between you and Mr. Nelson?

A. I told him I was very disturbed about it, that I had many accounts that I was working on that sold wall to wall carpeting and that they would all have to be advised of this decision, that I had hoped the order would be rescinded. He said we would talk about it later and that was it."

Thereafter, Mr. Ferris and Mr. Cronin held meetings with Mr. Nelson in an attempt to have the order re-

scinded (Tr. 904-908). Mr. Cronin specifically raised the consideration that the order might be in restraint of trade (Tr. 906).

Other merchants were advised by the Leisure World News, Walnut Creek that they would be unable to advertise carpets and drapes. Included in these were Capwell's, Jackson's and J. C. Penney (Tr. 907, Pl. Ex. 50-A, Tr. 294-295). Mr. Ferris, Mr. Cronin and Mr. Nelson attempted to have the national headquarters of Leisure World Foundation reverse the policy of no outside carpet advertising. Their decisions were memorialized in the contemporaneous business records written in this regard (Pl. Exs. 49, 50, 51 and 50-A). On September 20, 1965 Mr. Nelson wrote to Mr. Olsen (Pl. Ex. 49) stating in part (Tr. 446-447):

> "You are familiar with the change in policy at Walnut Creek not to run carpet ads in the Leisure World News with the exception of Crestmark Carpets as sold by Rossmoor Corporation. J. C. Penney and Capwell's both want to run carpet ads. Capwell's has been supporting us with an ad every week. J. C. Penney wanted to run a $108.00 ad each week for a full year. J. C. Penney entered their new merchandising program plans to sell carpets and drapes.
>
> • • •
>
> . . . We feel that by eliminating carpet ads, we will lose between $1,000 and $1,200 income per month."

Mr. Ferris carried out the policy of restricting carpets and drapes advertising to only Crestmark (Tr. 284). Mr. Ferris testified the policy applied to such accounts as Penney's, Capwell's, and Jackson's and that he undertook to dissuade his superiors from the policy (Tr. 289-

305). Mr. Ferris believed the policy caused a loss of revenue to the paper (Tr. 288-290). Mr. Rosen could no longer advertise carpets in the paper after July 1965, and he took steps to have the ads reinstated (Tr. 605). On August 16, 1965, Mr. Nelson informed Mr. Rosen's attorney that his letter of protest would be taken under advisement (Pl. Ex. 54, Tr. 325).

Before the 9/20/65 letter, Mr. Nelson had discussed with Mr. D. J. Krauter, Director of Administration of Leisure World Foundation (Tr. 544) the policy of cancelling ads (Tr. 436). Mr. Nelson went to Laguna Hills to discuss the matter (Tr. 438-439). The offices of Mr. Krauter and Mr. Olsen were in the Rossmoor Corporation headquarters building where Mr. Cortese's office was located (Tr. 556-558).

Then, on or about September 23, 1965, Mr. Nelson received a policy letter which limited advertising in the Leisure World News, of carpets and drapes, to Crestmark (Tr. 451-454). It provided in part (Pl. Ex. 51, Tr. 307):

> "3. The newspaper does not accept carpet and drapery advertising except the Rossmoor Leisure World company ads."

Crestmark continued to advertise in the Leisure World News (Pl. Ex. 57, 58, 104-119; advertising contract, Pl. Exs. 59 and 60).

The record further showed that Leisure World salesmen had previously sold carpets for Rossmoor's carpet company at Seal Beach and Laguna Hills (Tr. 945-951); that Mr. Cortese hired Mr. McMullen, the Manager of Crestmark, Tr. 968, Pl. Ex. 185; that the idea of selling carpets

and drapes for profit was Mr. Cortese's (Tr. 946); that Mr. Cortese would have liked to have sold all the carpets and drapes at the Leisure World communities (Tr. 985); that he kept advised of the Leisure World activities (Tr. 951); that he changed his deposition from that he never discussed carpets and drapes with Mr. Nelson to that he does not recall doing so (Tr. 977); that Mr. Cortese knew Crestmark employees were the color consultants for Leisure World Foundation (Tr. 989, he changed his deposition testimony as to this matter); that he presumes that an attempt was made by Crestmark to sell carpets and drapes when it assists the customer in color selection (Tr. 990); that he has guaranteed Leisure World's loans from United California Bank to the extent of $1,000,000 (Tr. 1052).

As to Mr. Cronin's testimony that Mr. Cortese was with Mr. Nelson when he first learned of the policy, Mr. Cortese testified that it was possible he was in Walnut Creek in the summer of 1965 (Tr. 1095-1096); that it was possible he saw Mr. Nelson at this time and that Mr. Nelson might have said something about carpeting, but that he did not recall (Tr. 1096-1101).

The initial estimates for Rossmoor Leisure World, Walnut Creek was for a community of 10,000 persons (Tr. 498). Mr. Rosen testified that a retailer could expect about a $2,000.00 carpet and drapery order on a move in (Tr. 645). The policy involved affected therefore $20,000,000 of sales of carpets and drapes.

There further is no dispute that in July, 1965 the Leisure World personnel in charge of sending out mailers

to prospective purchasers found that the edition of the Leisure World News containing Mr. Rosen's price advertising had been scooped up and were unavailable for mailing (Tr. 534-535).

3. Other Statements Made During the Course of the Conspiracy.

Mr. Ferris was informed at the time of his learning of the policy against allowing other than Crestmark Carpet company ads, that (Tr. 518):

> "Mr. Nelson told me that we would have to take the Walnut Creek Furniture advertisement out of the paper, and he told me that Mr. Cortese had told him that it should be taken out of the paper, and he quoted Mr. Cortese roughly as saying, 'tell that guy that runs the paper to get that ad out.'"

Mr. Krauter, supra, identified the problem of outsider advertising raised by Mr. Nelson at a staff meeting on August 5, 1965 as (Pl. Ex. 38) "problems concerning the acceptance of advertising in our Leisure World Newspaper which advertisements are directly competitive with our own sales interest and allied interests such as carpeting and draperies."

When Mr. Rosen was informed of his inability to advertise in the newspaper by Mr. Cronin, he was told, Tr. 603:

> "Well, Mr. Rosen, in all the 35 years that I have been in the newspaper business, I have never seen anything like this."

4. Injury and Damages.

The economic data presented by plaintiff and defendant included the sales, profits and losses of the plaintiff from

1963 to September 1967 (Df. Ex. E), the net worth of the plaintiff from 1962 to 1966 (Pl. Ex. 95), plaintiff's sales of carpets, draperies and furniture to residents of Rossmoor from 1965 to September 1967, on a month to month basis (Pl. Ex. 88A), Crestmark sales of carpets and draperies to residents of Rossmoor for the same period of time (Pl. Ex. 92), the testimony that the sales to Rossmoor in 1965 did not increase expenses or costs of Walnut Creek Furniture (Tr. 807-809), plaintiff's estimate of losses based on inability to advertise in the Rossmoor Leisure World News (Tr. 645-660).

For the third quarter of 1965 Mr. Rosen showed sales to Rossmoor of $17,000 and profits of $6,000 (Pl. Ex. 88A). The third quarter of the following year the sales to residents of Rossmoor, $3,556 in sales and $1,235 in profits (Id.). Mr. Rosen testified to the extensive volume of business generated by the advertisements (Tr. 633-639), and his belief that business was going to be very profitable (Tr. 646-662). In September 1967 Mr. Rosen was forced to close his doors because of lack of business (Tr. 617). No good will was received and in fact he showed a loss on closing in 1967 of $962.97 (Tr. 837).

5. Defenses.

The basic defense of respondents was to contest the conspiracy issue and interstate commerce (Tr. 41, 1254). They urged a single traders' right of selection of advertisers (Cr. 153). They also raised a confession and avoidance contending that Leisure World Foundation desired to prevent injury to manors which occurred when unaffiliated carpetlayers were involved (Df. Ex. B, Tr. 41, 504-506). But Mr. Robert Nelson testified that this was not men-

tioned as grounds for the restrictions on advertising (Id.). He admitted it was used only as an excuse (Tr. 509, 512-514). In fact, Crestmark contracted for the laying of carpets with outside installation companies (Pl. Ex. 195, 12, 15).

6. Interstate Commerce.

The matter of interstate commerce is set forth in footnote 1 in *Gough I*, Appendix B herein.

7. The Jury Answer to Interrogatories and Judgment.

Respondents proposed interrogatories for the jury to answer pursuant to F.R. Civ. P. 49(a) (Tr. 1323). The jury then returned the answers to the interrogatories as shown in *Gough I*, footnote 2. The trial court, the Honorable Elbert Parr Tuttle, then entered judgment for respondent on the failure of plaintiff to have proved jurisdiction (Cr. 285-287). Petitioner's motions for judgment *n.o.v.* or for a new trial were denied (Id.).

No motion for judgment *n.o.v.* was filed by respondents.

8. The Appeal by Petitioner in Gough I.

The Court of Appeals reversed the judgment for respondent here (Appendix B herein). It initially ordered that judgment be entered for plaintiff. Thereafter, respondents filed Appellees' Petition for Rehearing including Motion for Judgment Notwithstanding The Verdict, Motion for New Trial and Suggestion for Appropriateness of Rehearing *en banc* (Cr. 356-411).

The Petition for Rehearing was divided into four parts, Part I: Petition for Rehearing Addressed to the Panel

(Cr. 356-379); Part II: Petition for Rehearing by the Court Sitting *en banc;* Part III: Motion for Judgment Notwithstanding The Verdict (Cr. 391-405); Part IV: Motion for a New Trial (Cr. 406-411). Part I was divided into two sections. Part A claimed that the grounds for the decision were either waived by Rosen or were contrary to the law of the case. Part B claimed that entry of judgment in favor of the plaintiff was not a permissible disposition of the appeal. In this section respondents urged that they could not have conspired because they are affiliated and not in competition with each other (Cr. 372-373); that the objective of the conspiracy would not be in restraint of trade because it was not shown that the agreement had been entered into with an intent to create a monopoly or reduce the level of competition in the market or that it was a *per se* offense (Cr. 373-374). No *per se* offense was seen here because respondents had submitted the defense that they were protecting the manors from carpet installers at the newly constructed houses (Cr. 375-376). An attack was made because of the failure of the jury to resolve these issues notwithstanding the fact that the respondents composed these very interrogatories and submitted them to the court as dispositive (Tr. 1208). Respondents also urged in Part I, B., that the jury's answer to the interrogatory as to commerce affected the jury's consideration of other issues (Cr. 377-378).

The legal arguments were again reurged as grounds for a judgment *n.o.v.* although couched in terms of substantiality of the evidence. (Cr. 391-411). In addition respondent attacked the evidence as to damages (Cr. 398-405).

As to the motion for a new trial, defendants asserted: erroneous application of the co-conspirator exception to the Hearsay Rule (Cr. 406-409); erroneous admission of certain evidence (Cr. 410); erroneous interpretation of a stipulation as to genuineness and authenticity of documents and insufficient proof of damages. (Cr. 409-410).

In each case the respondents urged that judgment should be entered for them or that a new trial be granted, or that the trial court should be directed to make new findings or for rulings on the motions (Cr. 377, 379, 398, 411).

The Court of Appeals thereafter entered its order denying the petition for rehearing, denying the suggestion for a rehearing *en banc*, and stated; Cr. 289:

> "The last two sentences of the opinion filed October 17, 1973, are stricken and the following sentence added as a separate paragraph:
>
> > 'The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.'
>
> "The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc.
>
> "The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).
>
> "The petition for rehearing is denied and the suggestion for rehearing in banc is rejected."

The appellate court stated that the jury's answers to the special interrogatories allowed it to view respondents

as conspirators who had entered into a conspiracy to exclude plaintiff from the business of selling at retail in a local market products produced in other states, and that they had restrained plaintiff's retail business to his damage (Appendix B) The court also stated that the respondents, by restricting plaintiffs participation in retail transactions (at Rossmoor Leisure World), and by eventually excluding plaintiff entirely from this trade, diverted interstate shipments of carpeting from plaintiffs to themselves, thus interfering with the natural flow of interstate commerce. (Appendix B).

9. Proceedings on Remand.

Petitioner on remand moved to enter judgment on the opinion and mandate (Cr. 297-312). Defendants opposed the entry of judgment for plaintiff and filed Memorandum in Opposition to Motion to Enter Judgment (Cr. 342-414). The respondents represented to the trial court that they had raised in the court of appeals all of the grounds they would now urge for judgment *n.o.v.* or for a new trial (Cr. 348). Oral arguments were waived (Cr. 596-599).

The trial court thereafter ruled that the jury's findings were sufficient under law to enter judgment for plaintiff; that the respondents had urged upon the appellate court motions to enter judgment *n.o.v.* or for a new trial; that since the appellate court under *Neely* may make final disposition of such motions; the ruling of the court of appeals denying the petition for rehearing; declining to grant any motions of respondents, and failing to order the hearing of any motions of respondents, disposed of any attempt to urge upon the trial court the very same

matters already submitted to the appellate court and acted upon in its mandate (Appendix C herein). Thereafter, respondents filed motions for a judgment *n.o.v.* or for a new trial (Cr. 517-548). They were denied (Cr. 559).

10. The Appeal by Respondents.

Defendants below then appealed. Their brief contained no showing of any error in law or fact; only that the trial court had incorrectly interpreted the mandate; that the mandate, required a hearing of all the motions which they had addressed to the court of appeals (Opening Brief of Appellants, *Kerry M. Gough v. Rossmoor Corporation, et al.,* Nos. 75-1138, 75-1139).

The matter was then heard by a different panel. It concluded that the remand order of the court of appeals was an express direction to hear all the arguments advanced by the respondents, especially the arguments for a judgment *n.o.v.* It concluded that the dispositive language of the first opinion was based merely upon an assumption of the sufficiency of the evidence; that the evidence may not have been sufficient, and that the trial court erred in adjudging that the prior opinion and mandate did not allow re-argument of the motions addressed to the appellate panel, including the judgment *n.o.v.* (Appendix A herein).

REASONS FOR GRANTING THE WRIT

I

THE RIGHT TO A JUST TERMINATION OF LITIGATION AND THE AVOIDANCE OF UNNECESSARY RETRIALS REQUIRE A DETERMINATION OF THE RESPONSIBILITY OF THE APPELLATE COURTS AND THE POWER OF THE TRIAL COURT WHEN A JUDGMENT IS REVERSED ON APPEAL AND A LOSING APPELLEE FOR THE FIRST TIME RAISES A RIGHT TO A JUDGMENT N.O.V. OR A NEW TRIAL IN A PETITION FOR REHEARING.

A. Courts of Appeal Under Neely Are Not Deemed to Have Passed Back to the Trial Court the Issue of Substantiality of the Evidence to Support a Verdict After Review of the Complete Trial Record Where They Deny a Petition for Rehearing Without a Command for a Hearing on the Merits.

1. A Motion for Judgment n.o.v. Based on Substantiality of the Evidence Is Not Available After an Opinion of an Appellate Court Sustains a Cause of Action and an Appellee Has Not Complied With Rule 50(b).

This litigation, now in its eleventh year, should be terminated by this Court if the antitrust laws are to be a meaningful way of justifying wrongs done to private parties. This record discloses that all issues of fact and colorable claims as to law have been disposed of. Respondents here who had relied solely on the issue of interstate commerce to justify non-liability in their Briefs on the first appeal made a complete turnaround when they learned of their error and argued inconsistently with their arguments during the trial that, assuming a conspiracy was shown, it was not an actionable restraint of trade (Tr. 1005). It is clear that respondents are not entitled to a seriatim examination of their contentions made for the first time in a petition for rehearing on appeal in the light of the course of this litigation. First, *Neely v. Martin K. Eby Construction Co.,* 386 U.S. 317

(1967) authorizes an appellate court to decide all matters of law since the Federal Rules of Civil Procedure require speedy resolution of the litigation. (Fed. R. Civ. P. 1, 50, 61.) While an appellate court may remand for the consideration of the merits of matters of law, *Neely* directs that it be done as to only those matters which would raise the trial court's first hand knowledge of the witnesses and feel for the overall case. The judgment *n.o.v.* matters raised by respondents, especially the substantiality of the evidence, did not reach those kinds of issues. See also *United States v. Generes*, 405 U.S. 93 (1972). Thus *Neely* fully supports the trial court judgment in this case, as follows:

1) The losers on appeal sought a judgment *n.o.v.* but they did not comply with Rule 50(b), which requires a motion for a judgment *n.o.v.*, within 10 days after the judgment.

2) *Gough I* denied the respondents' petition for rehearing which contained all claimed errors of law. That denial was to be viewed in this light of *Neely's* express direction that the appellate courts are to advance the speedy termination of litigation.

3) The essential concern of the second appellate court here rests upon a belief that no court has ruled on the sufficiency of the evidence to go to a jury. But this issue of law, which the appellate court should determine, was disposed of in *Gough I* not only in its denial of the petition for rehearing but by its opinion which sustained petitioner's cause of action.

4) The contentions of respondents as to claimed errors of law have no color of validity.

Neely states that the loser on appeal should satisfy the requirements of Rule 50(b) before he can urge a judgment *n.o.v.* The court stated, 386 U.S. at 325-326:

> "The opinions in the above cases make it clear that an appellate court may not order judgment *n.o.v.* where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved."

Even as to new trial motions, *Neely* distinguishes between issues which the trial court has no particular competence or special advantage to decide from those issues which a trial court may be deemed to be in a better position to determine, i.e., matters involving demeanor of the witnesses or calls for a feel of the case (386 U.S. 324, 326, 327). Since the contentions of law raised in the petition for rehearing, were denied here without directing a hearing and the opinion discusses the evidence as though proved, *Neely* precludes a second appellate court from remanding for consideration matters of law necessarily resolved by the first opinion. When this Court determined a hearing should be held in the trial court it specifically indicated this in its mandate, *Iacurci v. Lummis Co.*, 387 U.S. 86 (1967).

It is respectfully submitted that two courts familiar with the trial record and the contentions of the parties have determined, as they must, that there is no genuine issue as to the substantiality of the evidence in this case. This Court, it is respectfully submitted, should inform the appellate courts of their responsibilities when a petition for rehearing raises for the first time a losing appellee's judgment *n.o.v.* contentions. *Neely* was a new trial case.

The learned court below viewed the denial of the petition for rehearing as a ruling raising motions for a new trial and a judgment *n.o.v.* In so doing it was clearly in error. The appellate court should not pass back to the trial court matters it alone must finally decide. There is no room herein for the contention that some court must hear the merits of respondents' contentions. See *Mays v. Pioneer Lumber Co.*, 502 F.2d 106 (4th Cir. 1974).

Respondents refused to seek a judgment *n.o.v.* under Rule 50(b) from the trial court before the appeal. They did not seek in their Brief On Appeal to raise the insubstantiality of the evidence in order to sustain the judgment below, but only sought to do so after learning of the reversal of this judgment. Their present position is shown to be a complete turnaround from the trial position in important respects. *Neely*, it is respectfully submitted, does not contemplate a second appellate court's concern for a loser on appeal in the light of these considerations.

II

A SUBSEQUENT COURT OF APPEALS MAY NOT CONTRADICT AND RENDER NUGATORY A DECISION OF A PRIOR COURT OF APPEALS.

A. By Express and Clear Implication There Was No Issue as to Substantiality of Evidence in the Remand by Gough I to the Trial Court.

1. Gough I Specifically Ruled on the Actionability of Petitioner's Cause of Action, Denied the Legal Matters Urged in a Petition for Rehearing and Were Presented With Frivolous Legal Contentions.

The heart of the matter at hand is simple. *Gough I* did not order a consideration of the merits as to one of respondents' motions. On a second appeal, the appellate court required such a consideration. But a mandate is completely controlling as to all matters within its compass. On remand the trial court is free to pass on any issue which was not expressly or impliedly disposed of on appeal. Whatever was before the appellate court and disposed of by the decree is considered as finally settled and becomes law of the case. *Atlas Scraper & Engineering Co. v. Purscne*, 357 F. 2d 296 (9th Cir. 1966). A second court of appeals is not to enter an order inconsistent or contradictory to the opinion of a prior panel. *May Department Stores v. Reynolds*, 140 F. 2d 799 (8th Cir. 1944).

A review of respondents' Petition For Rehearing, including Motion for Judgment *n.o.v.* Petition for New Trial and Suggestion for Appropriateness for Rehearing En Banc discloses that their central attack is not upon the substantiality of the evidence, but upon the application of legal standards to the jury's answers to the special interrogatories. Defendants' first arguments are contained in their Petition for Rehearing (Cr. 371-376).

There, they attack their own special interrogatory form. They claim contrary to their face that the answers did not establish a conspiracy in restraint of trade. They claim an actionable conspiracy arises only when the conspirators are horizontal competitors. They then urge that even assuming a vertical conspiracy, the conspiracy was not *per se* unlawful and that the conspiracy here was not in restraint of trade because of their defense that the restrictions on advertising reflected only a desire to avoid damage done by carpetlayers. They urged that a relevant market was not defined and that an erroneous answer to a special interrogatory necessarily affected all answers (Cr. 374-376). All these contentions were in the Petition for Rehearing which was denied in *Gough I.*

Clearly, a court of law must recognize these attacks as frivolous under the present state of antitrust law and under the express findings of the jury.

The plea that a conspiracy cannot be found here because the defendants and co-conspirators asserted they were working toward a common enterprise of building and marketing a housing development is directly contradictory to this Court's opinions in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). The very case cited, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969) is contrary to the contention advanced.

There is no need to prove a relevant market in the §1 action. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Further, the relevant market was designated

to be Rossmoor Leisure World, and respondents fully recognized this as a separate part of commerce in their drafting of the interrogatories. An intent and purpose to enter into an anti-competitive conspiracy was expressly found by the jury in answer to interrogatory Nos. 1 and 2 on their very form.

The respondents' defense of injury by carpetlayers, which was shown to be sham, is not cognizable at law. This conspiracy is unlawful *per se. Associated Press v. United States,* 326 U.S. 1 (1945); *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963). Petitioners' evidence was so substantial that a trial court could not have any judicial doubt in entering judgment for plaintiff.

Turning to the motion for judgment notwithstanding the verdict, Petition for Rehearing, Part III, although the heading purports to discuss the substantiality of evidence, it, in fact, reargues the same issues of law which the respondents discussed in Part I of the Petition for Rehearing. Here again the argument is that as a matter of law, the mutual purpose of the respondents and their co-conspirators allows their entry into an anti-competitive conspiracy. The other attack in this section is only addressed to their evidence in support of the defense there was no conspiracy. It fails entirely to discuss the substantiality of the evidence that the plaintiff offered in proof of the conspiracy. Mr. Robert Nelson never contradicted the testimony of Mr. Cronin that Mr. Nelson was talking with Mr. Cortese at the time the order went out to restrict advertising of carpets and drapes to Crestmark. Whether Mr. Nelson denied or did not deny the testimony of Mr. Ferris (Tr. 423), the record is abun-

dantly clear that substantial evidence exists in support of the jury's answers to the interrogatories. Mr. Nelson had also filed affidavits submitted to the F.H.A. that there was no identity of interest between Rossmoor Corporation and the Mutual Corporations, of which he was an officer (Pl. Ex. 183, Tr. 413-416). Yet his employer, Leisure World Foundation, was backed, at least to the extent of $1,000,000 loan guarantee, by the owner of Rossmoor Corporation. Nor is there any dispute of the fact that Mr. Nelson personally did not approve of the Leisure World policy of restrictive advertising and took steps to change the policy by visiting the officers of Leisure World who were in the same headquarters building with Mr. Cortese (Tr. 382-444, 450, 452).

Defendants do claim to attack the sufficiency of the damage award but in reality their arguments are addressed to fact weighing. Their attack is answered by the opinions of this Court in *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). It is clear that the trial court was correct in not entertaining these arguments of law in the face of the opinion in *Gough I*.

2. The Appellate Court in Gough I Did Not Require Arguments on Motions for a New Trial.

A motion for a new trial does allow judicial fact weighing. But clearly the trial court with knowledge of the evidence and record could not order a new trial consistent with the opinion of the court of appeals. Since it

knew of the overwhelming nature of petitioner's evidence, the determinations of law by the court of appeals could not allow a new trial. This petitioner is an injured victim of conduct forbidden by Congress. The trial court could not have any judicial doubt that judgment must be entered for petitioner. Nor could it fail to follow the court of appeals direction that the case was established as a matter of law.

It is respectfully submitted that a court of appeals does not issue an opinion of the kind written here without it being said that expressly or impliedly there is no question of a right of plaintiff to judgment.

B. Even Assuming that Gough I Did Not Decide the Issue of Sufficiency of Evidence an Appellate Court Is Compelled by the Antitrust Decisions of This Court to Find Liability as a Matter of Law.

1. The Evidence of a Discriminatory Policy Which Favors and Protects a Group of Corporations From Competition Is Illegal Per Se. This Is Especially So When the Acting Parties Have a Trust Relationship to the Consuming Public.

Private actions under the antitrust laws were designed by Congress so that a plaintiff such as Mr. Rosen should come forward and expose the conspiracy involved here. There is no dispute that Leisure World Foundation had a trust relationship with the owners of the Manors at Rossmoor, further, that Mr. Cortese knew of this trust relationship. Notwithstanding these circumstances, defendants admit that a restrictive policy was promulgated by Leisure World Foundation. Further, it was not disputed at the trial that the policy's sole beneficiaries were Crestmark and Rossmoor Corporation. The issue that defendants raised was whether or not Mr. Cortese or Crestmark was

the man or company who put the policy into effect. The evidence is overwhelming that Mr. Cortese did so. But even assuming not, the evidence that Crestmark was the beneficiary of the policy known to restrain trade and commerce was actionable as a matter of law. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). *United States v. General Motors Corp.*, 384 U.S. 127 (1966). As stated in *Albrecht v. Herald Co.*, 390 U.S. 150, fn. 6:

> "Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced policy applied to all carriers, most of whom acquiesced in it."

Since defendants admit unity with the publisher in seeking development of the community, contrary to their representations to the F.H.A., the admitted facts require a judgment for petitioner. The necessary consequence of the restrictive advertising policy was to restrain free market entry.

It is clear that the Court of Appeals in *Gough II* in the light of the record here and applicable law should not have remanded this case.

III

THE DECISION BELOW IS IN CONFLICT WITH THE SETTLED RULE OF LAW THAT CASES ARE NOT REMANDED UNLESS ERROR IS DISCLOSED.

A. The Court Below Denied the Motions of the Respondents and on the Second Appeal They Failed to Show Any Error Which Disallowed a Judgment for Petitioner.

The opinion of the trial court on remand dated October 8, 1974, is based upon the motion of the plaintiff to enter judgment following the decision of the court of appeals in *Gough I*. Following this determination and ensuing judgment, defendants then filed motions for judgment *n.o.v.* and for a new trial. These were denied (Cr. 559). Indeed, respondents sought to tax costs based on the denial of this motion. The denial of these motions was not shown by respondents on their appeal to be in error. They only argued that the reasons for the denial of the motions were based upon court's belief it was precluded from hearing the matters on the merits. But the respondents made motions to the trial court, and they were denied by the trial court which was fully familiar with the record and fully cognizant of the contentions of the parties.

It is respectfully submitted that it was incumbent upon respondents to show errors of law on appeal as to these rulings and they completely failed to do so. Petitioner should not be required to assume the burden of arguing matters presented to the first appellate court and the trial court after a second appeal. A court does not reverse a judgment unless error is shown. Two courts had reviewed the record and found nothing justifying a specific call to hear arguments claiming error.

The trial court under the mandate in *Gough I* had absolute discretion to conclude that judgment should be entered for petitioner. The mandate in *Gough II* recognizes the discretion of the trial court and that exercise has been applied to enter judgment for petitioner. Substantial justice requires the termination of this litigation. See *Perkins v. Standard Oil Co. of California,* 395 U.S. 642 (1969).

CONCLUSION

It is respectfully urged that for the foregoing reasons a writ of certiorari be granted.

Dated, June 18, 1976.

MAXWELL KEITH,
PHILIP KEITH,
ANTHONY J. MERCANT,
MERCANT & O'BRIEN,
By MAXWELL KEITH,
Attorneys for Petitioner.

(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-1138
75-1139

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,
vs.
Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[March 17, 1976]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: WRIGHT and KILKENNY, Circuit Judges and CHRISTENSEN,* Senior District Judge.

WRIGHT, Circuit Judge:

This antitrust case appears before us for the second time. At trial the jury returned a verdict for defendant Rossmoor through answers to special interrogatories. On appeal this court determined that one of the interroga-

*Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

tories was improperly submitted to the jury and that the jury's answer was wrong as a matter of law. With this answer disregarded, all remaining jury answers were in favor of plaintiff Gough. *Gough v. Rossmoor Corp.*, 487 F.2d 373 (9th Cir. 1973).

This court originally directed that

> [i]n view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed and the cause remanded for this purpose.

Rossmoor petitioned for rehearing and included within that petition motions for judgment n.o.v. and new trial. The petition was denied, without reference to the motions included therein. However, this court modified the order quoted above, to read as follows:

> The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

487 F.2d at 378.

On remand, Rossmoor renewed its motions for judgment n.o.v. and new trial. The trial judge, believing that he was foreclosed by our modified opinion from exercising his discretion as to these motions, denied both of them.

The sole issue presented is whether the trial judge correctly determined that our order remanding "for further proceedings consistent with this opinion" foreclosed his subsequent exercise of discretion on the motions for judgment n.o.v. and new trial. We hold that he did not.

That this court might have considered the motions for judgment n.o.v. and new trial on their merits is made clear by the Court in *Neely v. Eby Construction Co.*, 386 U.S. 317, 323 (1967). However, more often than not this

court should refer such motions, arising for the first time on appeal, to the trial court so that it can first pass on them. *Id.* at 323-26. *See also Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967).

Unless this court expressly or by clear implication disposes of motions raised for the first time on appeal, it must be presumed that they will first be acted upon by the trial court on remand. The above rule is necessary to insure that *some* court consider the merits of the motions which a party is entitled to present.

In the first appeal of the instant case, this court neither expressly nor by clear implication ruled on the motions presented in the rehearing petition. To the contrary, the modification of the order from one requiring that "judgment . . . [be] entered for plaintiff" to one remanding "for further proceedings consistent with this opinion" strongly implied that the motions were to be entertained below on remand.

Gough directs our attention to certain language in our earlier opinion regarding the jury's factual findings on (a) power and intent to exclude, and (b) damages. We said those findings "established, as a matter of law," that defendants had engaged in illegal conduct which injured plaintiff. 487 F.2d at 376. Gough argues that by this language the court effectively denied the motions for judgment n.o.v. and new trial. We disagree.

Read in context, the use of the term "matter of law" suggests that the factual issues of power and intent, and damages, were as a matter of law properly presented to the jury. By contrast, the interstate commerce issue should not have been submitted to the jury, since "[t]he

undisputed facts established that the necessary relationship to interstate commerce did exist." 487 F.2d at 377.

Nowhere in the course of the opinion preceding the phrase "matter of law" does this court set forth the evidence in such a way as to support a conclusion that the jury *must*, "as a matter of law," have found for plaintiff. Therefore, the "matter of law" language may mean that if the jury's answers were properly based on adequate evidence, the judgment must under law be for the plaintiff. If this interpretation is correct, the trial judge must now decide, in entertaining the motions for judgment n.o.v. and new trial, whether the evidence supported the jury's answers.

Assuming, without deciding, that Gough is correct in interpreting the "matter of law" language as being in effect a denial by this court of the motions presented, we would still reverse. The number of possible interpretations of the "matter of law" language suggests that none of them is supported by "clear implication." Thus the interpretation suggested by Gough, even if correct, cannot foreclose the exercise of discretion by the trial judge on remand.

Since the trial judge acted on the mistaken assumption that he could not adjudge the motions for judgment n.o.v. and new trial, we must remand so that he may do so. *See Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933); *Southern Pac. Co. v. Guthrie*, 186 F.2d 926 (9th Cir. 1951).

The cause is remanded for the trial judge's consideration of the merits of Rossmoor's motions for judgment n.o.v. and new trial.

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 26,475

Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellant,

vs.

Rossmoor Corporation, Golden Rain Foundation, Leisure World Foundation, and Crestmark Carpet and Drapery Company.
Defendants-Appellees.

[October 17, 1973]

Appeal from the United States District Court
for the Northern District of California

Before: BROWNING, DUNIWAY, and GOODWIN,
Circuit Judges

BROWNING, Circuit Judge:

Plaintiff sued defendants for treble damages under section 4 of the Clayton Act (15 U.S.C. § 15) for violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2). The case was submitted to the jury on special interrogatories. The jury responded that defendants had entered into a conspiracy to exclude plaintiff from the

business of selling at retail in a local market products produced in other states, that they had restrained plaintiff's retail business to his damage, but that their acts had not had "a substantial effect on interstate commerce or the flow of interstate commerce." Because of this negative answer regarding the effect of defendants' conduct on interstate commerce, the district court entered judgment for defendants. We reverse.

Plaintiff was sole proprietor of a retail store selling carpets, drapes, and household furniture in Walnut Creek, California. Defendants are two members of a group of corporations that buy and sell land and construct, sell, furnish, and manage residential developments. These developments are referred to individually and collectively as "Rossmoor Leisure World."

Defendant Rossmoor Corporation is the primary developer. Defendant Crestmark Carpet and Drapery Company is a wholly owned subsidiary of Rossmoor that sells carpets and drapes to residents of Rossmoor Leisure World, including the development in the Walnut Creek area.

All the carpeting sold by plaintiff and defendant Crestmark to residents of the Walnut Creek Rossmoor Leisure World during the relevant period was manufactured outside California and shipped to plaintiff and defendant Crestmark either directly or through in-state wholesalers.[1]

[1]Defendant Crestmark's sales of carpeting and padding to residents of Rossmoor Leisure World at Walnut Creek exceeded $380,000 in 1965, $565,000 in 1966, and $305,000 in 1967. The volume of plaintiff's sales of carpeting to residents of the development is not entirely clear from the record, but defendants conceded at oral argument that such sales were not *de minimis*. Moreover, plaintiff testified, and the jury necessarily found, that such sales would have been substantially greater but for defendants' acts.

In response to interrogatories submitted under Rule 49(a), Fed. R. Civ. P., the jury found that defendants and their subsidiaries had the power and intention to exclude plaintiff from the business of selling carpeting to residents of the Walnut Creek Rossmoor Leisure World; that they entered into a scheme to prevent plaintiff from advertising in the Leisure World News, a "house" newspaper for that development, "such as to act as a restraint on plaintiff's business"; and that, as a result, plaintiff suffered some $50,000 damages in loss of profits and good will. However, to the question "Did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?" the jury answered "No"[2] Judgment was entered for defendants on the ground that this last answer deprived the court of jurisdiction under the Sherman Act.

The jurisdictional issue under the Sherman Act is distinct from the substantive issue of whether a given de-

[2]The written submission to the jury read as follows:

The following questions are being submitted to you for your answer in order to aid the Court in reaching a decision in this matter.

You should recognize that your answers to these questions will be the basis for the Court's decision which will decide whether or not the plaintiff is entitled to recover or not from the defendants.

You are to answer the following interrogatories as applicable. Before any question may be answered, all 12 of the jurors must agree on the answer.

1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

Yes X

No .....

2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foun-

fendant's conduct was of the kind prohibited by the Act. *Rasmussen v. American Dairy Ass'n,* 472 F.2d 517, 521-24 (9th Cir. 1973). The jurisdictional issue is one of constitutional power. Congress intended to extend the substantive prohibitions of the Sherman Act to the farthest reaches of its power under the Commerce Clause, thereby mandating for this nation a competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce. *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558-59 (1944). The jurisdictional question, therefore, is whether defendants' conduct had a sufficient relationship to interstate commerce to be subject to regulation by Congress. *Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 521. This, in turn, depends upon whether defendants' conduct had a "substantial economic effect" upon interstate commerce, or, "'concerns more States than one' and has a real and substantial relation to the national interest" in a competitive economy. *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 255 (1964)

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dation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

Yes X
No .....

3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

Yes .....
No. X

4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

Yes X
No .....

5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

Net Profits	$18,143.00
Goodwill	22,738.00

quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196-97 (1824); *see Rasmussen v. American Dairy Ass'n, supra,* 472 F.2d at 522-23. *See, generally,* 1 von Kalinowski, Antitrust Laws & Trade Regulation § 5.01[4] (1969).

The substantive issue, on the other hand, is whether defendants participated in anticompetitive conduct of the kind encompassed within the statutory terms "restraint of trade," "monopolize," or "attempt to monopolize." In terms of this case, the substantive question was whether defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News, and if so, whether such conduct was the kind of anticompetitive conduct prohibited by the Act.

Thus, although the substantive and jurisdictional issues are often confusingly described in terms of the "effect" of particular conduct upon commerce, as if a common question were presented, *see, e.g., Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739-40 n.3 (9th Cir. 1954), the substance of the two inquiries is quite different. An unreasonable restraint on competition may have no impact upon interstate commerce, or an impact so insignificant that regulation under the Commerce Clause is not justified as a means of protecting interstate commerce. *Page v. Work,* 290 F.2d 323, 331-32 (9th Cir. 1961). Or conduct clearly having a substantial economic impact on interstate commerce may not violate the Act's prohibitions against unreasonable restraints of trade and monopolization. *Cartrade, Inc. v. Ford Dealers Advertising Ass'n,* 446 F.2d 289, 292 (9th Cir. 1971).

When the issue is whether the defendant's conduct violates the norms of the statute, the focus is upon commercial competition: whether the defendant's conduct—"in" or "affecting" interstate commerce or not—unreasonably restrains competition in the market place. When the issue is whether jurisdiction exists, the focus is upon interstate commerce: whether the defendant's conduct—unreasonably restrictive of competition or not—has a sufficient impact on interstate commerce to justify regulation under the Commerce Clause.

In the present case, the jury's factual findings that defendants, with the power and intent to exclude plaintiff from the Rossmoor Leisure World market, entered into a common scheme or plan to restrain plaintiff's business by preventing him from advertising in the Leisure World News established, as a matter of law, that defendants had engaged in the type of anticompetitive conduct that Congress intended to prohibit by the Sherman Act. The jury's further findings that plaintiff suffered monetary damages in a determined amount by reason of defendants' conduct, established, as a matter of law, that plaintiff was among the class of private persons authorized by the Clayton Act to seek redress for such conduct. Defendants do not argue to the contrary.

The sole question here is jurisdictional: did defendants' conduct have a sufficient relationship to interstate commerce to be within Congress' power to regulate, and hence to come within the Sherman Act?

Defendants argue that the jury's specific finding that defendants' acts did not have a "substantial effect on interstate commerce or the flow of interstate commerce" is conclusive of jurisdiction. We disagree.

It is doubtful whether the jurisdictional issue should have been submitted to the jury, even had the evidence been in dispute. Except where the jurisdictional issue and the issues on the merits are factually "completely intermeshed," *McBeath v. Inter-American Citizens for Decency Committee,* 374 F.2d 359, 362-63 (5th Cir. 1967), it may well be the court's function to resolve factual disputes relevant to jurisdiction on motion under Rule 12(b)(1), Fed. R. Civ. P., rather than the jury's function to resolve such disputes in the trial of the case on the merits. *See Page v. Work, supra,* 290 F.2d at 334; *Bailey's Bakery, Ltd. v. Continental Baking Co.,* 235 F.Supp. 705, 714 (D.C. Hawaii 1964); 5 Wright & Miller, Federal Practice & Procedure § 1350, at 556-58; 5 Moore's Federal Practice ¶38.36 [2.-2], at 298-300; *but see Marks Food Corp. v. Barbara Ann Baking Co.,* 274 F.2d 934 (9th Cir. 1959).[3]

Even assuming, however, that the resolution of conflicts in the evidence as to jurisdictional facts is the function

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[3]Professor Moore summarizes the policy considerations supporting this view as follows:

> As a matter of policy, however, there is much to be said for approaching problems of statutory coverage as triable to the court when reasonably separable from the facts of violation. The difference is this: if coverage is treated as substantive for purposes of mode of trial, the issue of whether a cause of action is stated must be left to the jury in cases in which underlying facts are not in dispute, but different inferences may be drawn from them. Thus on the same business arrangements one case may be decided one way and another in a different way, as the jury may find that the arrangements did or did not affect commerce . . . . Surely these are matters that should be treated as a matter of law so that the perimeter of the statute can be worked out in the appellate courts. When there is . . . in the case of the antitrust case a factual question as to details of the defendant's business activities, such questions could be put to the jury as special interrogatories, or a special verdict employed.

5 Moore's Federal Practice ¶ 38.36 [2.-2], at 300.

of the jury, the jury must be given adequate instructions as to the legal standard to be applied. *Ratigan v. New York Central R.R.*, 291 F.2d 548, 554 (2d Cir. 1961); 5A Moore's Federal Practice, *supra*, ¶49.02, at 2206 n.7; 9 Wright & Miller, Federal Practice & Procedure, *supra*, § 2506, at 502. The interrogatory submitted to the jury in the case (question "3," *supra* note 2) did not inform the jury of the constitutional tests for determining whether the relationship between defendants' conduct and interstate commerce was such as to permit Congress to prohibit defendants' conduct. Nor was the general explanatory instruction given to the jury adequate to this purpose.[4]

In any event, there was no conflict in the evidence as to the facts relevant to jurisdiction. The undisputed facts established that the necessary relationship to interstate commerce did exist. In these circumstances, it was error to submit the jurisdictional issue to the jury under Rule 49(a). *Wirtz v. La Fitte*, 326 F.2d 856, 858-60 (5th Cir. 1964); *W. R. Grimshaw Co. v. Nevil C. Withrow Co.*, 248 F.2d 896, 902-03 (8th Cir. 1957); 9 Wright & Miller, *supra*, at 499. The jury's erroneous answer to the jurisdictional interrogatory should have been ignored. *Ratigan v. New York Central R.R., supra*, 291 F.2d at 554-55; *W. R. Grimshaw Co. v. Nevil C. Withrow Co., supra* 248 F.2d at 902-05; *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 99-103 (1st Cir. 1932).

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[4]The only relevant portion of the instructions reads (Tr. 1310):

> The Sherman Act applies to parties whose acts are in the course or flow of commerce across state lines or whose acts, although local, substantially affect interstate trade and commerce. By substantial the law means not de minimis—not insignificant, an amount more than trifling. The amount of interstate trade involved, if substantial, is not material, since the Sherman Act brands as illegal the character of the restraint, not the amount of commerce affected.

We need not stop to inquire whether retail sales of carpeting to Rossmoor Leisure World residents occurred "in" interstate commerce, for it is clear that defendants' anticompetitive conduct in connection with such sales necessarily had the "substantial economic effect" upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a "substantial" volume of carpeting from the states of manufacture to the Walnut Creek, California, area. *See Cartrade, Inc. v. Ford Dealers Advertising Ass'n, supra*, 446 F.2d at 292. Elimination of competition in these intrastate sales of goods produced in other states "inevitably" affected the interstate commerce in such goods: "When competition is reduced, prices increase and unit sales decrease," resulting in fewer purchases from out-of-state producers. *Burke v. Ford*, 389 U.S. 320, 322 (1967). By restricting plaintiff's participation in these retail transactions, and eventually excluding plaintiff entirely from this trade, defendants diverted interstate shipments of carpeting from plaintiff to themselves, thus "interfer[ing] with the natural flow of interstate commerce." *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). The states in which the carpeting is manufactured as well as the State of California are concerned with the conditions under which carpeting is sold at retail to California residents. And the relationship between the elimination of competition in these retail sales of carpeting at Rossmoor Leisure World and the national interest in the distribution of carpeting in a free competitive economy is not so tenuous as to bar federal intervention, though the market monop-

olized in this instance was small. *Id.* at 213-14. *See also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961).

Jurisdiction under the Sherman Act was therefore clearly present. The judgment is vacated and the cause remanded for further proceedings consistent with this opinion.

Appendix C

In the United States District Court
for the Northern District of California

Civil No. 45531 GBH

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff,
vs.
Rossmoor Corporation, et al.,
Defendants.

[Filed Oct. 8, 1974]

JUDGMENT OF MANDATE
FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

This case originally came on for trial before a jury upon interrogatories agreed upon between the parties. The interrogatories and the answers given to them by the jury were as follows:

"1. Did the defendants and Leisure World Foundation or Golden Rain Foundation by means of a common plan scheme or design have the power and intention to exclude plaintiff from the carpet and/or other business in Rossmoor Leisure World?

"Yes.

"2. Did defendants enter into a common plan, scheme or design with Leisure World Foundation or Golden Rain Foundation to prevent plaintiff from advertising carpets in the Leisure World News such as to act as a restraint on plaintiff's business of selling carpets or other merchandise at Rossmoor Leisure World?

"Yes.

"3. If your answer to either of the preceding questions is in the affirmative, did such restraint have a substantial effect on interstate commerce or the flow of interstate commerce?

"No.

"4. Has plaintiff suffered any monetary damage by reason of its inability to advertise in Leisure World News?

"Yes.

"5. If so, please indicate the amount opposite the appropriate type of damage you find to have been suffered.

"Net Profits	$18,143.00
"Goodwill	22,738.00"

It is apparent that the jury made findings to the effect that the defendants and others had the power and design to and actually did engage in conduct which acted as a restraint on the plaintiffs' business of selling carpets or other merchandise at the locale involved. It is also clear that the jury determined the monetary loss suffered by the plaintiffs by reason of such conduct.

It is equally apparent that by answering question number three in the negative the jury indicated that such

restraint did not have "a substantial effect on interstate commerce or the flow of interstate commerce."

On appeal the Court of Appeals for this Circuit held that the answers to the interrogatories other than interrogatory number three made irrelevant the jury's response to that interrogatory. The Court stated:

> "For it is clear that the defendants' anticompetitive conduct in connection with such sales necessarily had the 'substantial economic effect' upon interstate commerce in carpeting requisite to the exercise of federal regulatory power. The retail transactions affected by defendants' conduct were essential to the continued movement of a 'substantial' volume of carpeting from the states of manufacture to the Walnut Creek California area, citing Cartrade, Inc. v. Ford Dealers' Advertising Association, *supra*, 446 F.2d at 292."

The Court of Appeals therefore set aside the judgment in favor of the defendants which had been entered by this Court based upon the jury responses to the interrogatories.

In its original order the Court of Appeals stated:

> "In view of the jury's findings with respect to substantive violation and damage, judgment should have been entered for plaintiff. The judgment is reversed, and the cause remanded for this purpose."

Thereafter, the original defendants, the appellees, filed a document entitled Appellee's Petition for Rehearing Including Motion for Judgment Notwithstanding the Verdict, Motion for New Trial and Suggestion of Appropriateness of Rehearing En Banc. That document not only undertook to reargue the merits of the original appeal, but

also, as indicated in the title, contended that the trial court had erred in not granting their motion for directed verdict and pursuant to what they contended to be the teaching of Neeley v. Martin K. Eby Construction Co., 386 U.S. 317, they urged that the Court of Appeals itself enter an order by way of judgment notwithstanding the verdict. Further, also relying upon the *Neeley* case they urged that the Court of Appeals order the grant of a new trial.

These two parts of the motion were based upon allegations that there was not sufficient evidence to sustain the jury's finding of a conspiracy or the other elements of an alleged anti-trust violation and further that there was insufficient evidence to sustain the jury's verdicts as to the damages sustained from the anti-trust violations which they found to exist.

Upon consideration of the petition the Court of Appeals modified the last paragraph of the opinion by striking the two sentences quoted above and substituting the following as a separate paragraph:

> "The judgment is vacated and the cause remanded for further proceedings consistent with this opinion."

The order then ended with the following language.

> "The petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

The appellant, the original plaintiff in the action, has now filed his motion in this Court to enter a judgment in his favor for the amount of damages ascertained in the jury's verdict, contending that this is the only action available to the Court under the remand from the Court

of Appeals. To the contrary, appellees, the original defendants, contend that they may now have heard by the trial court a new motion for judgment notwithstanding the verdict and their motion for a new trial as an alternative.

The answer to this question seems to have been resolved against the contention of the defendants-appellees by their contentions presented to the Court of Appeals in connection with their petition for rehearing. Part III and Part IV of their petition urged the Court of Appeals to enter a judgment n.o.v. or, in the alternative, an order granting a new trial. They based their contention that this was a proper procedure on the case of Neeley v. Martin K. Eby Construction Co., *supra,* and especially the *Neeley* case discussion of Federal Rule 50(d).[1] Although the rule itself states only that in the case of a party positioned as were the parties here, the appellees had open to them the right to argue that the judgment in their favor should have stood even though this Court incorrectly applied the jury verdict, by the process of requesting the appellate court to grant a new trial, the language of the Supreme Court extends to an appellee under such

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[1]Rule 50(d) provides:

"(d) Same: Denial of Motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

As amended Jan. 21, 1963, eff. July 1, 1963." Rule 50(d) Fed. R. Civ. P.

circumstances the further right to seek in the Court of Appeals an order for a judgment n.o.v. The Court said:

> "Rule 50(d) is applicable to cases such as this one where the trial court has denied a motion for judgment n.o.v. [After the jury verdict responding to the special interrogatories was filed the appellant here, the original plaintiff, filed a motion for judgment n.o.v. and for new trial. Both of these motions were denied by the trial court.] Rule 50(d) expressly preserves to the party who prevailed in the district court [Here the appellees.] the right to urge that the Court of Appeals grant a new trial should the jury's verdict be set aside on appeal. Rule 50(d) also emphasizes that 'nothing in this rule precludes' the Court of Appeals 'from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.' Quite properly, this rule recognizes the appellate court may prefer that the trial judge pass first upon the appellee's new trial suggestion. Nevertheless consideration of the new trial question 'in the first instance' is lodged with the Court of Appeals and Rule 50(d) is permissive in the nature of its direction to the Court of Appeals: As in Rule 50(c)(1) *there is nothing in Rule 50(d) indicating that the Court of Appeals may not direct entry of judgment n.o.v. in appropriate cases.*" 386 U.S. 317, 323-324. (Emphasis added).

This course of events is precisely what happened in this case. The plaintiff Rosen, complaining of the Court's interpretation of the jury verdict, filed a motion for judgment n.o.v. and for new trial. These motions were denied. Thus, the present appellees were the prevailing party on that motion. Rule 50(d) expressly authorizes them to

raise in the Court of Appeals all of the contentions that they now seek to make here which would authorize either a new trial or a judgment in their favor based on the theory that there was insufficient evidence to take the case to the jury in the first place. Of course all other grounds for the granting of a new trial, such as objections to either the admission or refusal of the admission of evidence, the measure of damages and the like would properly be contained in such motion.

In their motion for rehearing the appellees stated:

> "The [apppellate] court may either order a new trial itself or return the case to the district court for a ruling on the motion." Citing *Neeley* at 328-24, 325. (sic).

In the language of the Court on page 329 it seems to be decisive on the point.

> "In our view, therefore, Rule 50(d) makes express and adequate provision for the opportunity—which the plaintiff-appellee had without this rule—to present his grounds for a new trial in the event his verdict is set aside by the Court of Appeals. If he does so in his brief—*or in a petition for rehearing if the Court of Appeals has directed entry of judgment for appellant*—the Court of Appeals *may make final disposition of the issues presented,* except those which in its informed discretion should be reserved for the trial court. If appellee presents no new trial issues in his brief or in a petition for rehearing, the Court of Appeals may, in any event, order a new trial on its own motion or refer the question to the district court, based on factors encountered in its own review of the case. *Compare* Weade v. Dichmann, Wright and Pugh, Inc., *supra.*"

Here the order of the Court of Appeals stated unequivocally, following considerations of the petition for rehearing, "the petition for rehearing is denied and the suggestion for rehearing en banc is rejected."

Thus, it is clear that the Court of Appeals declined to grant the petition for the entry of a judgment n.o.v. or the petition for the grant of a new trial. Neither did the Court determine that these questions should be remanded to the trial court for consideration. This Court construes the order of the Court of Appeals as having decided these issues on the merits, inasmuch as they were presented in full and denied by the Court.

The Court concludes that the judgment in favor of the defendants heretofore entered must be VACATED and judgment entered in favor of the plaintiff for three times the amount determined by the jury, together with costs and attorney's fees.

Elbert P. Tuttle
United States Circuit Judge,
Sitting by designation

Appendix D

STATUTES INVOLVED

Section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide (Sherman Act, Sections 1 and 2, July 2, 1890, Chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2):

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal. . . .

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

Appendix E

In the United States Court of Appeals
for the Ninth Circuit

No. 75-1138
75-1139

Kerry M. Gough, Trustee in Bankruptcy of Louis Rosen, dba Walnut Creek Furniture,
Plaintiff-Appellee,

vs.

Rossmoor Corporation and Crestmark Carpet and Drapery Company,
Defendants-Appellants.

[Filed Jun. 4, 1976]

ORDER

Before: WRIGHT and KILKENNY, Circuit Judges, and CHRISTENSEN, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Kilkenny have voted to reject the en banc suggestion.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: